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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-221

RUTH ROBINSON,

Petitioner,

—v.—

THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY, a body corporate, and ROBERT R. MARTIN, President of Eastern Kentucky University,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016
725-1222

Attorneys for Petitioner

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THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY, a body corporate, and ROBERT R. MARTIN, President of Eastern Kentucky University,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-titled case on March 28, 1973.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 475 F.2d 707 and is set out in the Appendix, *infra*, p. 15. The order of the United States District Court for the Eastern District of Kentucky, dismissing the petitioner's suit, and its findings of fact and conclusions of law, are set out in the Appendix, *infra*, p. 25.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 28, 1973. A petition for rehearing was denied on May 17, 1973. This Court has jurisdiction under 28 U.S.C. §1254(1).

Questions Presented

1. Whether sex-based classifications are inherently suspect and therefore must be subject to strict judicial scrutiny?

2. Whether a public university may, consistent with the equal protection clause of the Fourteenth Amendment, establish different dormitory hour regulations for students solely on the basis of sex?

3. Whether the sex-based regulations in question may be sustained as bearing a reasonable relationship to the furtherance of a legitimate governmental interest?

Constitutional Provision and Regulations Involved

United States Constitution, Amendment XIV:

> "... nor shall Any State ... deny to any person within its jurisdiction the equal protection of the laws."

Dormitory Hour Regulations of Eastern Kentucky University (pertinent parts):

> "Women students not qualified for self-regulated hours or not desiring to exercise this privilege, will observe

the hours of midnight Sunday through Thursday and 2:00 A.M. Friday and Saturday. These hours shall apply for all classifications of women students. With parental permission, self-regulated hours will be available for all female students who have completed at least one semester of full-time work totaling twelve-semester hours. Female students exercising the privilege of self-regulated hours will be charged an additional cost of $10.00 per semester."

Statement of the Case

The petitioner, a female student of Eastern Kentucky University, filed a class action in the United States District Court for the Eastern District of Kentucky during the 1971-2 school year when she was a freshman student, challenging on equal protection grounds the University's dormitory hour regulations. At that time the regulations provided for self-regulated hours for all male students, but female students had restricted hours during their freshman year, and thereafter could obtain self-regulated hours only if they had maintained a C average in their academic work, were not on academic or social probation and had, if under the age of 21, obtained written parental permission. A $15 fee per semester was charged to female students who had self-regulated hours, but not to male students. During the pendency of this litigation the University promulgated new dormitory hour regulations. All male students, irrespective of age or class year, continued to have unrestricted dormitory hours. First semester freshman female students are required to be in their dormitory by midnight Sunday through Thursday and by 2 A.M. on Friday and Saturday nights. After the first semester, female

students can have self-regulated hours with written parental permission if under the age of 21. A $10 fee per semester is charged to female students who have self-regulated hours, but not to male students. In Kentucky the age of majority for males and females is 18 except for the purchase of alcoholic beverages and for purposes of care and treatment of handicapped children, for which 21 is the age of majority. Kentucky Revised Statutes 2.015.

The District Court upheld the regulations against the petitioner's constitutional challenge and dismissed the suit. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I.

The present case demonstrates the necessity for this Court to hold definitively that sex-based classifications are inherently suspect and therefore subject to strict judicial scrutiny.

In *Frontiero* v. *Richardson*, 93 S. Ct. 1764 (1973), four Justices of this Court held that sex-based classifications were inherently suspect and therefore subject to strict judicial scrutiny. Mr. Justice Stewart, concurring in the judgment, preferred to label the distinction there as "invidious." Mr. Justice Powell, Mr. Chief Justice Burger and Mr. Justice Blackmun took the position that this Court should defer its decision on that question since the case could be decided on the authority of *Reed* v. *Reed*, 404 U.S. 71 (1971), and since the Equal Rights Amendment, which would necessarily cause sex-based classifications to be sub-

ject to the test of strict scrutiny, remains pending before the States for ratification.

The perspective of the court below demonstrates the necessity for a definitive holding that sex-based classifications are suspect and therefore subject to close judicial scrutiny. The theme of the opinion is paternalistic protection—though old enough to vote and ranked as adults for most purposes under state law, college women, like children, are not to be trusted to determine for themselves the hours they will keep. This Court once embraced paternalism of this kind, and has not yet formally discarded the position. E.g., *Muller* v. *Oregon,* 208 U.S. 412, 422 (1908) (women must "rest upon and look to [men] for protection"); *Hoyt* v. *Florida,* 368 U.S. 57, 62 (1961) ("We cannot say it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be released from the civic duty of jury service. . . ."). Until paternalism of this order is squarely rejected, women will continue to be ranked as less than fully adult persons by men of the law and will be subjected to "benign" treatment ultimately harmful to their growth and development as independent individuals.

As familiar as the misguided paternalism evident in the opinion below, is the nose-count technique indulged by the court. Many colleges and universities, we are told, have different dormitory hour rules based solely on the sex of the student. 475 F.2d at 708. Again, the source of nose-count reasoning is capricious. See, e.g., *Fay* v. *New York,* 332 U.S. 261, 289-90 (1947); *Hoyt* v. *Florida, supra,* 368 U.S. at 63 (reciting the number of states that barred or exempted women from jury service).

Speculation that change for the future may be forthcoming from the legislature has not led this Court in the past to shy from responsibility for application of the Constitution as a living document, meant to govern society as it evolves through time. E.g., *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax); *Roe* v. *Wade*, 410 U.S. 113 (1973).

Ratification of the Equal Rights Amendment remains problematic. Proponents of sexual stereotyping, still dominant in the political arena, continue to draw support from judicial decisions, including decisions of this Court. Moreover, if the Amendment is ratified, two years will elapse until it becomes effective. At this juncture, only one observation can be made with certainty: In this latter half of the Twentieth Century, sex-based discriminations remain a pervasive pattern in the law[1] and paternalistic attitudes among judges and legislators continue to substitute for reasoned analysis.

The Court of Appeals explicitly "reaffirmed" that sex was not a suspect classification and that the "rational relationship," or traditional standard of equal protection review was applicable to test the validity of the regulations in question. While the petitioner contends that the regulations are invalid even under the traditional standard of review, the fact that the court was applying the traditional test clearly influenced the result. The court stated that the regulations were "presumptively valid" and observed that, "Courts often have upheld state classifications based

[1] *See, e.g.*, Petition for Certiorari, Appendix E, *Moritz* v. *Commissioner*, No. 72-1298.

on sex." 475 F.2d at 410.[2] It then found the regulations rationally related to a legitimate governmental interest, i.e., concern for the safety of women students. 475 F.2d at 711.

The petitioner argued that the regulations could not reasonably be related to the safety of women, since there was a shifting curfew for the different nights of the week and since any woman could have self-regulated hours after the first semester if she obtained parental permission. The court responded in a fashion once euphemized as chivalrous, but today recognized as sexist: "The State could properly take into consideration the fact that on weekend nights many coeds have dates and ought to be permitted to stay out later than on weekday nights." 475 F.2d at 711. It did not respond to the argument that the safety rationale was undermined by the fact that women could have self-regulated hours with parental permission, but here too the implication is clear: the State could reasonably conclude that if a woman's parents are willing to let her "take the risk," their judgment should be accepted, but that she could not make the judgment on her own. A more demeaning view of the capacity of women to make independent judgments concerning their own well-being cannot be imagined, but it is precisely this view of women that the Court of Appeals accepted.

It cannot be doubted that under the strict scrutiny standard the regulations in question could not have been permitted to stand, hence the anxiety of the court below to

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[2] *Hoyt* v. *Florida*, 368 U.S. 57 (1961), was cited as principal authority for this statement.

interpret *Reed* v. *Reed, supra,* as confirming application of the traditional "reasonable relationship" test to sex-based classifications.[3] So long as courts can invoke that standard of review when dealing with sex-based classifications, there is clearly the danger that such classifications will be upheld where, as here, they incorporate long-standing notions of the "weakness" of women and of man's "natural role as their protector." *Frontiero* v. *Richardson,* 93 S. Ct. at 1769.

Stated simply, the application of the traditional standard of equal protection review can lead, as it has here, to the upholding of sex-based classifications that are premised on the notion of male supremacy. So long as a court can say, as the court below did here, that, "Courts have often upheld state classifications based on sex," and can hold that regulations such as those involved here are reasonably related to the effectuation of a legitimate state interest, the rights of women to equal protection of the laws will be severely limited. It is not enough for this Court to invalidate particular sex-based classifications as it did in *Frontiero* and *Reed.* It must declare definitively that sex-based classifications are inherently invidious and can be sustained only by the showing of a compelling state interest that cannot be effectuated in any way other than the making of such a classification. The present case, it is submitted, shows the necessity of this Court's taking such a position, and for this reason certiorari should be granted.

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[3] Overlooking this Court's own subsequent comment on *Reed,* see *Eisenstadt* v. *Baird,* 405 U.S. 438, 447 n. 7, the Court of Appeals declared that *Reed* "impliedly denied the contention . . . that sex is a 'suspect classification,' " 475 F.2d at 711.

II.

The decision of the Court below to the effect that a public university may, consistent with the equal protection clause of the Fourteenth Amendment, establish different dormitory hour regulations for students solely on the basis of sex is inconsistent with decisions of this Court and of other Courts of Appeals as to the validity of sex-based classifications.

What stands out most clearly from this Court's decisions in *Reed* v. *Reed,* 404 U.S. 71 (1971), and *Frontiero* v. *Richardson,* 93 S. Ct. 1764 (1973), is that with respect to persons similarly situated the state cannot mandate a preference solely on the basis of sex. The same rationale is found in the decisions of other Courts of Appeals invalidating sex-based classifications. See *e.g., Lamb* v. *Brown,* 456 F.2d 18 (10th Cir. 1972); *Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973).[4] The sex-based distinction involved in the case at bar, like those involved in *Reed* and *Frontiero,* mandates just such a preference. Male students, regardless of their age or class year, are given self-regulated hours. Female students, even though they may be considered adults under state law, cannot have self-regulated hours during the first semester of their freshman year and can have them thereafter only if they obtain parental permission.

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[4] Paradoxically the Sixth Circuit has held that the mandatory discharge from public employment due to pregnancy is constitutionally impermissible, *LaFleur* v. *Cleveland Board of Education,* 465 F.2d 1185 (6th Cir. 1972), cert. granted, —— U.S. ——, 93 S.Ct. 1921 (1973), while the Fourth Circuit has held that such a rule does not constitute discrimination on the basis of sex. *Cohen* v. *Chesterfield County School Board,* 474 F.2d 395 (4th Cir.), cert. granted, —— U.S. ——, 93 S.Ct. 1925 (1973).

The sole justification for the classification here is that it was necessary for the safety of women. Women are pictured as helpless creatures, not only "more likely to be criminally attacked later at night and physically less capable of defending themselves than men," 475 F.2d at 711, but incapable of making judgments with respect to their own safety. If a woman's parents decide that she can "stay out late," she can have self-regulated hours after the first semester, but her judgment is subordinated to that of her parents. A male is presumed capable of making that decision even if he is a minor.

The "protection" advanced by the regulations is clearly an instance of "romantic paternalism which should be rejected as unduly Victorian," *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969), and which, in practical effect, puts women "not on a pedestal, but in a cage." *Frontiero* v. *Richardson*, 93 S. Ct. at 1769. Moreover, the sex-based classification at issue here, like all such classifications, is both over-inclusive and under-inclusive. Many women are capable of physically defending themselves and many men are not, but the regulations proceed on stereotyped assumptions about the "strength" of men and the "weakness" of women. The state asserts an interest in protecting the safety of a woman who has taken a course in self-defense, but disdains any interest in protecting the safety of a male who is frail or physically handicapped. Moreover, confronted by an armed assailant, the victim is not likely to be aided by his or her relative strength.

No challenge is made to the power of a public university to impose reasonable dormitory hours. But these regula-

tions cannot be based solely on the sex of the student. It is completely contrary to those principles of equal protection propounded by this Court in *Reed* and *Frontiero* for a public university to allow males to have self-regulated hours without regard to age or school year and to impose conditions on females solely by virtue of their sex, including the requirement that adult women obtain parental permission.[5]

III.

The approach of the court below to the question of whether a classification bears a reasonable relationship to a legitimate governmental interest is patently inconsistent with the approach followed by this Court to the determination of such questions.

Throughout this litigation the petitioner has contended that even if the purported protection of the safety of women could be considered a legitimate governmental objective, the regulations in question cannot rationally be sustained as a safety measure. As in *Eisenstadt* v. *Baird*, 405 U.S. 438, 452 (1972), "Despite the regulations' superficial earmarks as a safety measure, safety, on the face of the regulations, may not reasonably be regarded as their purpose." In the first place, there are different curfew hours for different days of the week. It is very hard to believe that on Friday and Saturday the danger of rape is only after 2:00 A.M. while on other days the rapists come out

[5] The case at bar was decided prior to this Court's decision in *Frontiero*, which was rendered on May 14, 1973. However, the petitioner's Petition for Rehearing was not denied until May 17, 1973, and the Sixth Circuit presumably was aware of the result in *Frontiero* when it denied the Petition.

after midnight. The Court of Appeals could hold that this did not undermine the safety justification of the regulations only by invoking the notion of the "male protector," concluding that, "The State could properly take into consideration that on weekend nights many coeds have dates and ought to be permitted to stay out later than on weekday nights." 475 F.2d at 711. But there is no requirement that a woman have a "male protector" in order to stay out late on weekends, and even if she has such a "protector", she must be in at the earlier hour on weekdays.

The second argument against the safety rationale is that after the first semester women can have self-regulated hours with parental permission. If women were really in danger of criminal attack after a certain hour, the danger would be present whether or not their parents gave them permission to stay out late.

In cases such as *Eisenstadt* v. *Baird, supra,* and *James* v. *Strange,* 407 U.S. 218 (1972), this Court has made it clear that even under the "reasonable relationship" standard of equal protection of review, courts are not to engage in "judicial hypothesizing" to uphold a classification. Unless the specific provisions of the laws or regulations that create a classification between persons otherwise similarly situated can in fact be said to be reasonably related to the accomplishment of the purported purpose, the classification will be invalidated on equal protection grounds. See the discussion in Gunther, The Supreme Court 1971 Term: Foreword, 86 *Harv. L. Rev.* 1, 20-21 (1972).

In the case at bar the Court of Appeals hypothesized the male protector to uphold the shifting curfew for women and did not even attempt to rationalize the relationship

between a genuine safety concern and the parental consent factor. Because its approach was patently inconsistent with the approach followed by this Court to determine the validity of classifications under the "rational relationship" standard of equal protection review, certiorari should be granted.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Respectfully submitted,

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioner

July 1973

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-1867

RUTH ROBINSON,

Plaintiff-Appellant,

v.

THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY, a Body Corporate, and ROBERT R. MARTIN, President of Eastern Kentucky University,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY.

Decided and Filed March 28, 1973.

Before: PHILLIPS, Chief Judge, KENT, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

PHILLIPS, Chief Judge. This is another case in which this Court is urged to assume the prerogatives of a super Board of Regents and make a decision concerning the internal administrative affairs of a university involving no violation of any constitutional right of any student. This we decline to do.

Like many universities and colleges, Eastern Kentucky University promulgated dormitory hour regulations for women students during the 1971-72 academic year. During their freshman year, women students were required to be in their dormitories by 10:30 p.m. Monday through Thursday. The curfew hour on Friday and Saturday nights was 1 a.m. and 12:00 midnight was the Sunday curfew.

Beginning with the second year of study, the women students could have the privilege of unrestricted hours with no curfew requiring their presence in their dormitory by a certain hour. Three conditions had to be met, however, to qualify for this privilege: 1) the student was required to have a C average in her academic work and not be on academic or social probation; 2) she was required to pay a $15 fee per semester;[1] 3) if under 21, the student was required to gain her parents' written consent to the exercise of self-regulated hours. Those sophomore, junior and senior women failing to qualify for unrestricted hours were required to be in their dormitories by midnight Sunday through Thursday and by 2 a.m. on Friday and Saturday nights. The regulations were issued by the Board of Regents of the University, an agency of the Commonwealth of Kentucky, K.R.S. § 164.310. These regulations were clearly those of the State.

During the pendency of this action, the University announced new regulations in this area. First semester fresh-

[1] The district Court found that the $10 fee per semester under the new regulations charged to those women with unrestricted or self-regulated hours is "to defray the cost of security guards and additional monitoring services necessary for those dormitories which remain open all night." The men's dormitories on the campus do not have such service. Presumably, the same justification was present for the $15 fee under the original regulations. No contention is made by the appellant that the fee is improper or in any way restrictive of her rights.

man women, under the new regulations, are required to be in their dormitory by midnight Sunday through Thursday and by 2 a.m. on Friday and Saturday nights. All other women students in the University can have self-regulated hours by paying a $10 fee per semester and gaining permission of their parents if they are under 21. All women who do not have self-regulated hours are subject to the same curfews as the first-semester freshmen. It should be noted that at no time relevant to this action, either under the old or new regulations, have there been any curfew restrictions on male students at Eastern Kentucky.

Appellant's class action was filed in the District Court for the Eastern District of Kentucky during the 1971-72 school year when she was a freshman at Eastern Kentucky. She claims that the University, by imposing dormitory hours for women, while granting self-regulated hours to all male students, regardless of age or permission from their parents, has volated her Fourteenth Amendment right to the equal protection of the law. Appellant appeals from the dismissal of her suit by the District Court. We affirm.

Appellant was a sophomore at the University at the time of the District Court's dismissal of her suit. She claims that even though under the presently applicable dormitory regulations she can, and does, have self-regulated hours with her parents' permission, the fact that she must get her parents' permission for unrestricted hours while male students need not get such permission results in a continuing denial of her equal protection rights. In view of our disposition of this case we need not decide this issue.

At the outset, we point out that students, no less than any other citizens of the United States, are protected by the Constitution of the United States. For a general discussion, see Wright, *The Constitution on the Campus,* 22 Vand. L.

Rev. 1027 (1969). As the Supreme Court stated, in *Tinker* v. *Des Moines School District,* 393 U.S. 503, 506 (1969): "It can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate." *See also Healy* v. *James,* 408 U.S. 169, 180 (1972). Although *Tinker* concentrated on the First Amendment rights of students, we construe it as equally applicable to all constitutional protections. It also is clear that the state, in operating a public system of higher education, cannot condition attendance at one of its schools on the student's renunciation of his constitutional rights. *West Virginia* v. *Barnette,* 319 U.S. 624 (1943); *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961); *Knight* v. *State Board of Education,* 200 F. Supp. 174 (M.D. Tenn. 1961).

However, the Supreme Court has recognized repeatedly that the campus presents a unique situation which imposes special considerations in the application of Constitutional protections and "judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . ." *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968). *See also Tinker, supra,* at 507; *Bright* v. *Nunn,* 448 F.2d 245 (6th Cir. 1971); *Norton* v. *Discipline Committee of East Tennessee State University,* 419 F.2d 195 (6th Cir. 1969).

The equal protection clause does not require identical treatment for all people. The states retain, under the Fourteenth Amendment, the power to treat different classes of persons in different ways. *Reed* v. *Reed,* 404 U.S. 71, 75-76 (1971); *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802 (1969); *Barbier* v. *Connolly,* 113 U.S. 27 (1885). This is a well-established doctrine, dating from soon after the ratification of the Fourteenth Amendment. Courts often have upheld state classifications based on sex. *Hoyt* v.

Florida, 368 U.S. 57 (1961); *Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, —— U.S. ——, 41 U.S.L.W. 3376 (January 9, 1973); *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968). Therefore, the appellant has not overcome the presumptive validity of the state regulations involved, *McDonald, supra*, merely by showing that one set of rules applied to men and another to women students at Eastern Kentucky.

Before addressing the question of whether there has been a deprivation of the right of appellant to equal protection of the law, we must determine which standard of review will be applicable. Two separate and distinct standards of review under the equal protection clause have emerged. The first, which has a much longer history, is the traditional or rational basis test. It requires that a state classification be upheld unless there is no rational relationship between the classification imposed by the state and the state's reasonable goals. Under this standard, "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). *See also Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

The second alternative standard, the compelling state interest test, is relatively recent in formulation and provides a greater burden for the state to meet in justifying a classification in its statutes or regulations. This test, which becomes applicable when a fundamental right of the aggrieved party is at issue or a suspect classification, such as race, is used, requires that to justify the classification, the state must demonstrate a compelling state interest. Fundamental interests which have triggered the application of

the compelling state interest test have included the right to vote, *Dunn* v. *Blumstein,* 405 U.S. 330, 337 (1972); *Evans* v. *Cornman,* 398 U.S. 419, 422 (1970); the right to interstate travel, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); the right to procreate, *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942); and the right to fair treatment in criminal appeals, *Griffin* v. *Illinois,* 351 U.S. 12 (1956). At least one commentator has observed that the Supreme Court seems to be very reluctant to extend the scope of the so-called "new equal protection" and declined to insert its application into new areas last Term. Gunther, *The Supreme Court 1971 Term: Foreword,* 86 Harv. L. Rev. 1, 12-13 (1972).

In its most recent case involving discrimination on the basis of sex, the Supreme Court, although striking down the Idaho statute in question, did not apply the compelling state interest standard. Instead, in *Reed, supra,* at 76, the Court carefully framed the issue as "whether a difference in the sex of competing applicants for letters of administration *bears a rational relationship* to a state objective . . . ." (emphasis added). By the holding, the Court impliedly denied the contention of the appellant in that case that sex is a "suspect classification," capable of triggering the application of the compelling state interest standard. The most recent case in this circuit concerning discrimination on the basis of sex also imposed the rational relationship test and refused to find that discrimination by sex was a suspect classification. *Morris* v. *Michigan State Board of Education,* —— F. 2d —— (6th Cir., January 25, 1973). Likewise, in this case we can find neither a fundamental right at issue nor a suspect classification being applied. The right which is the subject of regulation here is the

right to have self-regulated hours without parental permission. This is not fundamental. We reaffirm that classification on the basis of sex is not a suspect classification. Therefore, we conclude that the rational relationship or traditional standard of equal protection review is applicable here.

The State's basic justification for the classification system is that of safety. It asserts that women are more likely to be criminally attacked later at night and are physically less capable of defending themselves than men. It concludes that the safety of women will be protected by having them in their dormitories at certain hours of the night. The goal of safety is a legitimate concern of the Board of Regents and this court cannot say that the regulations in question are not rationally related to the effectuation of this reasonable goal.

The appellant claims that the safety justification is undermined by the shifting curfew for different nights of the week, asserting that the streets are no safer at 12:30 a.m. on Saturday than they are at 12:30 a.m. on Wednesday. We hold, however, that the State could properly take into consideration the fact that on weekend nights many coeds have dates and ought to be permitted to stay out later than on weekday nights. A classification having some reasonable basis does not offend the equal protection clause merely because it is not drawn with mathematical nicety. *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Lindsley, supra.*

We are mindful of this court's recent decision in *LaFleur* v. *Cleveland Board of Education*, 465 F. 2d 1185 (6th Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3315 (Dec. 5, 1972). We conclude that our affirmance of the District Court in the present case is not inconsistent with the ma-

jority opinion in *LaFleur,* in which this court held that a rule requiring pregnant teachers to take a 5-month predelivery leave was unconstitutionally discriminatory. The core of that opinion was that men, as well as women, are subject to "illnesses and disabilities," while only pregnant women were required to take leave. The *LaFleur* regulation was struck down for overbreadth. We do not read *LaFleur* or any other case as holding or implying that discrimination based on sex is unconstitutional *per se.*

We hold that the Board of Regents of Eastern Kentucky, an agency of the Commonwealth, has promulgated a reasonable regulation to promote the legitimate aims of the state.

Affirmed.

Order Denying Petition for Rehearing

(Filed May 17, 1973)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-1867

RUTH ROBINSON,

Plaintiff-Appellant,

—v.—

THE BOARD OF REGENTS OF EASTERN KENTUCKY, ETC., *et al.*,

Defendants-Appellees.

Before PHILLIPS, *Chief Judge,* KENT, *Circuit Judge,* and MCALLISTER, *Senior Circuit Judge.*

No judge of this court having moved for rehearing *in banc,* the petition for rehearing has been considered by the original panel.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

JAMES A. HIGGINS,
Clerk.

Confirmation of Entry of Judgment

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

JAMES A. HIGGINS
Clerk

March 28, 1973

Mr. Robert Allen Sedler
Lexington, Kentucky 40506

Messrs. John W. Palmore and
George T. Ross
Richmond, Kentucky 40475

Messrs. Bert T. Combs, Charles R. Simons
& John W. Palmore
Louisville, Kentucky 40202

Re: Ruth Robinson, Plaintiff-Appellant
v.
The Board of Regents of Eastern Kentucky
University, et al., Defendants-Appellees
Case No. 72-1867

Gentlemen:

Enclosed is a copy of the Court's opinion which was announced today in the above-entitled case.

A judgment in conformity with the opinion has been entered today as required by Rule 36.

Yours very truly,

JAMES A. HIGGINS, *Clerk*

GRACE KELLER, *Chief Deputy*

Enclosure

Court's Findings of Fact and Conclusions of Law

[Filed August 7, 1972]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2375

RUTH ROBINSON,

Plaintiff,

—v.—

THE BOARD OF REGENTS, EASTERN KENTUCKY UNIVERSITY, *et al.*,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been brought on for hearing on the 27th day of June, 1972, on Defendants' Motion to Dismiss, and the Court having heard the arguments of counsel and considered the pleadings, admissions, stipulations and memoranda of law, and there being no issue of fact to be resolved; and the Court having at that time announced from the Bench its decision sustaining defendants' Motion to Dismiss; and order dismissing the Complaint having been entered herein on June 29, 1972; and the Court having considered the proposed Findings of Fact and Conclusions of Law submitted by the defendants herein and being suffi-

ciently advised; the Court does now make the following Findings of Fact and draws the following Conclusions of Law herein:

FINDINGS OF FACT

1. The plaintiff, Ruth Robinson, during the school year 1971-1972 was a citizen of the United States and the Commonwealth of Kentucky, over the age of 18 years, was enrolled as full-time freshman student at Eastern Kentucky University which is a state supported institution of higher learning, and resided in a student dormitory provided by the University. Plaintiff now has completed her freshman year and is classified as a sophomore.

2. The defendant, Board of Regents of Eastern Kentucky University, is a body corporate organized under Chapter 164 of the Kentucky Revised Statutes. Defendant, Robert R. Martin, is the President of Eastern Kentucky University and as such is charged with the direction, government, and management of the affairs of the University including the enforcement of all rules and regulations established by the Board of Regents.

3. The Board of Regents has established rules and regulations regarding dormitory hours for its female students which provide in pertinent part as follows:

> "Women students not qualified for self-regulated hours or not desiring to exercise this privilege, will observe the hours of midnight Sunday through Thursday and 2:00 A.M. Friday and Saturday. These hours shall apply for all classifications of women students.

With parental permission, self-regulated hours will be available for all female students who have completed at least one semester of full-time work totaling twelve-semester hours. Female students exercising the privilege of self-regulated hours will be charged an additional cost of $10.00 per semester."

4. The cost of $10.00 per semester is to defray the cost of security guards and additional monitoring services necessary for those dormitories which remain open all night. This service is not provided for male student dormitories.

5. Male students living in dormitories have self-regulated hours without any requirements with respect to parental permission, age, or level of study.

6. The plaintiff voluntarily enrolled at Eastern Kentucky University and entered into a residence hall contract which in pertinent part provides as follows:

"1. The student agrees

A. •••

B. •••

C. To exercise reasonable care in the use of the facilities of the residence hall; to care for and clean his room; to abide by all regulations pertaining to the residence halls of the University, whether such regulations be now in effect or later enacted.

D. •••

E. •••

F. •••

G. To occupy said residence hall space in accordance with all rules and regulations of the University."

7. The plaintiff has entered into a residence hall contract for the 1972 Fall Semester and has obtained parental permission for self-regulated hours.

8. Eastern Kentucky University draws the majority of its students from the eastern portion of the state. The prevailing social and moral values of Eastern Kentucky and the University's scholastic requirements dictate that young ladies (many of whom are away from home for the first time) who live in college dormitories during their freshman year of college conform to reasonable dormitory rules, and that young ladies beyond the freshman level, under the age of 21, be required to obtain parental consent to any exception from reasonable parietal regulations. The Board of Regents of Eastern Kentucky University recognizes these social and moral standards as being reasonably necessary for the health, safety, and educational advancement of its students. The Board of Regents also recognizes and the Court finds that the great majority of parents of those female students who attend Eastern Kentucky University expect and demand that the University have such rules.

Conclusions of Law

1. This Court has jurisdiction of the subject matter and the parties under 28 U.S.C. §§ 1343 (3), 2201, 2202, and 42 U.S.C. § 1983.

2. The Board of Regents of Eastern Kentucky University has inherent authority as well as statutory authority

to promulgate rules and regulations for the purpose of maintaining discipline, and to provide for the health, safety and educational opportunities of its students. *Norton* v. *Discipline Committee of East Tenn. State University,* 419 F.2d 195 (6th Cir. 1969); *Bright* v. *Nunn,* 448 F.2d 245 (6th Cir. 1971).

3. The Board of Regents and the University is charged with the responsibility of maintaining a proper educational atmosphere for its students and for maintaining the moral and social standards of the region from which it primarily draws its students.

4. Sex can be a valid basis for classification in matters in which sex is a natural factor if classification is not palpably arbitrary and is rationally related to a legitimate object or purpose. *Clarke* v. *Redeker,* 259 F. Supp. 117 (D. Ia. 1966).

5. The parietal regulations complained of are reasonably necessary if Eastern University is to attract students from the region which it serves, and are not palpably arbitrary, nor rationally unrelated to a legitimate object or purpose.

6. Federal courts should not intervene in administrative matters within state educational institutions which do not directly implicate basic constitutional rights. *Bright* v. *Nunn,* 448 F.2d 245 (6th Cir. 1971).

7. The plaintiff has voluntarily chosen to attend Eastern Kentucky University and has voluntarily submitted to the university's parietal rules and has failed to allege any direct injury requiring injunctive or declaratory relief by this Court. *Grise* v. *Combs,* D. C. Ky. (1960) 183 F. Supp. 705. *Gilmore* v. *James,* 274 F. Supp. 75 (1967) affd. 88

S. Ct. 695, 389 U.S. 572, petition for rehearing denied 88 S. Ct. 1027, 390 U.S. 572, *Syna* v. *Diners Club, Inc.*, 49 F.R.D. 119 (1970). Plaintiff has failed to allege injury by the enforcement of the regulations complained of and a federal court will refrain from passing upon the validity of rules and regulations of a state agency or upon a complaint of one who fails to show injury by its enforcement.

8. The Constitution of Kentucky § 3 guarantees equal protection of the laws.

9. Federal Courts should avoid needless friction between federal pronouncements and state policies. Federal Courts should abstain from considering federal constitutional issues where the matter may be resolved under state law and eliminate the need to reach the federal constitutional issues at all. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); *Reetz* v. *Bozanich*, 397 U.S. 82 (1970); *Askew* v. *Hargrave*, 401 U.S. 476 (1971).

10. Plaintiff has not been deprived of any Constitutional right and has not presented a justiciable issue which would authorize the intervention of this Court.

This the (illegible) day of August, 1972.

BERNARD T. MOYNAHAN, JR.,
Judge.

A True Copy Attest

Davis T. McGarvey, *Clerk*
U. S. District Court

By (illegible)

D. C.